VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort
Land Use Permit #5L0646-3-EB (Revocation)

MEMORANDUM OF DECISION

This decision pertains to a motion to dismiss and to preliminary issues raised in connection with a petition to revoke a permit issued for summer concerts at the Stowe Mountain Resort ski area. As is explained below, the Environmental Board denies the motion to dismiss and sets the matter for hearing.

I. BACKGROUND

On June 30, 1993, the District #5 Commission issued Land Use Permit Amendment #5L0646-3 (the Amendment), pertaining to sumrner concerts at a ski resort that is located in the Town of Stowe and is operated by Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort (the Permittee). The Amendment specifically authorizes the extension of Land Use Permit Amendment #5L0646-2 until October 1, 1997, and authorizes the use of previously approved improvements for a maximum of 10 concerts per year, June 1 to October 1.

On December 17, 1993, Joseph F. Welch (the Petitioner) filed a petition for revocation under Board Rule 38(A) on the grounds that several adjoining landowners, including the Petitioner, had not been notified of application #5L0646-3.

On February 9, 1994, Acting Chair Lawrence H. Bruce, Jr. convened a prehearing conference in Stowe. On March 4, 1994, Board Counsel Aaron Adler issued a memorandum to parties reminding them of deadlines established at the prehearing conference. The March 4 memorandum is incorporated by reference.

On March 9, 1994, the Board received the following documents: (a) a motion to dismiss and memorandum of law filed by the Permittee; (b) a memorandum of law filed by the Petitioner through his attorney, Paul Gillies, Esq.; and (c) a letter filed by James Stewart and James Robison.

On March 23, 1994, the Board received reply memoranda from the Permittee and the Petitioner. On March 24, the Acting Chair issued a prehearing conference report and order, which is incorporated by reference. The Board deliberated on March 30, 1994.

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II. DISCUSSION

The issue raised by the petition to revoke is whether to revoke the Amendment pursuant to 10 V.S.A. § 6090(c) and Rule 38(A) for the alleged lack of notification to the Petitioner of the application for the Amendment. The Permittee concedes that it did not provide Mr. Welch's name to the District Commission in filing the application for the Amendment and that Mr. Welch therefore was not notified. The Permittee nonetheless moves to dismiss this petition on the grounds that the petition does not contain sufficient allegations to warrant revocation, arguing that the Petitioner must allege and prove that the Permittee's failure to provide his name to the District Commission was willful or grossly negligent and that the District Commission's decision would have been different if the information had been provided. Since the petition does not make these allegations, the Permittee argues that the petition must be dismissed, because unless such allegations are made and proved, the Board has no authority to order the Amendment revoked or declare it void.

The Board denies the Permittee's motion because it believes that a hearing is required to determine whether the permit should be revoked for violation of the rules of the Board, and because the Permittee's failure to provide the Petitioner's name appears to constitute a violation of Board Rule 10(F), which requires that an applicant submit all names of adjoining landowners to the District Commission.

Act 250 confers authority on the Board to revoke a permit on several different bases: (a) violation of permit conditions, (b) violation of the terms of the application, or (c) violation of the Board Rules. 10 V.S.A. § 6090(c) states:

> A permit may be revoked by the board in the event of violation of any conditions attached to any permit or the terms of any application, or ***violation of any rules of the board.***

(Emphasis added.)

Interpreting this provision, the Board has issued Rule 38(A), which provides that the Board may, after hearing, revoke a permit if any one of the following circumstances applies: (a) the applicant willfully or with gross negligence supplied inaccurate, incomplete, or erroneous information to the Board or District Commissions, and accurate and complete information could have led to a different decision, (b) violation of the terms of the permit or permit conditions, (c) violation of the approved terms of the application, (d) violation of

the Board Rules, and (e) failure to file a required affidavit of compliance. In relevant part, Rule 38(A) provides:

> Grounds for revocation. The board may after hearing revoke a permit if it finds that: ***(a) The*** applicant or his representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or ***(b)*** the applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, ***or the rules of the board;*** or (c) the applicant or his successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.

(Emphasis added.) Rule 38(A) was ratified by the General Assembly in 1985 and therefore has the force and effect of a legislative enactment. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330, 336 (1989).

Thus, both the statute and the rule governing revocation of Act 250 permits provide, as a distinct and separate ground for revocation, the violation of the Board Rules. Neither the statue nor the rule requires that, in addition to proving that the Rules were violated, the person seeking revocation on the basis of a rule violation must also prove willful or gross negligence and change in outcome.

In this case, it appears that the Board Rules may have been violated. The Petitioner alleges that he is an adjoining landowner who was not notified of the application for the amendment and the Permittee concedes that it did not provide the Petitioner's name to the District Commission in filing the application for the Amendment. This would appear to contradict Rule 10(F), which requires that applicants provide the names of all adjoining landowners to the district commissions when applications are filed, unless waived by the district coordinator, and which gives the district commissions discretion to notify or not to notify the adjoining landowners. Rule 10(F) provides:

> The applicant shall file with the application a list of adjoining property owners to the tract or tracts of land proposed to be developed or subdivided, unless this requirement is waived by the district coordinator. Provision of personal notice to adjoining

> property owners and other persons not listed in section (E) of this Rule shall be solely within the discretion and responsibility of the district commission.

Like Rule 38(A), Rule 10(F) was ratified by the legislature in 1985.

Rule 10(F) is not simply a technicality but is an important rule. Under 10 V.S.A. 6085(c), adjoining landowners have a right to participate in Act 250 proceedings to the extent that their property is directly affected under one or more of the Act 250 criteria at 10 V.S.A. § 6086(a). If the District Commission is not given the names of adjoining landowners, then the District Commission cannot notify them, and the landowners are deprived of the opportunity to be heard concerning potential adverse effects on their interests.

The Supreme Court has held that, in the absence of compliance with Rule 10(F), "the District Commission's issuance of a permit ... cannot be sustained." In re Conway, 152 Vt. 526,531 (1989).

Accordingly, the Board believes that this petition for revocation is sufficient to survive a motion to dismiss. The Board therefore will proceed to hearing in this matter, as required by Rule 38(A) and 3 V.S.A. § 814. Such hearing will have two purposes.

The first purpose will be to give the parties an opportunity to be heard and to present evidence concerning whether there has been a violation of Rule 10(F) in this matter.

The second purpose will be to give the parties an opportunity to be heard and to present evidence concerning whether, if a violation is proved, the Permittee should be given an opportunity to correct that violation prior to any final revocation of the Amendment, and if so, what the nature of that opportunity should be. This is based on Rule 38(A), which provides in relevant part:

> (3) Opportunity to correct a violation. Unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the board shall give the permit holder reasonable opportunity to correct any violation ***prior to any order of revocation becoming*** *final.* For this purpose, the board shall clearly state in writing the nature of the violation and the steps necessary for its correction or elimination. These terms may include conditions, including the posting of a bond

> or payments to an escrow account, to assure compliance with the board's order. In the case where a permit holder is responsible for repeated violations, the board may revoke a permit without offering an opportunity to correct a violation. ...

(Emphasis added.)

Following the hearing, parties will be given an opportunity to file legal memoranda on the issue of whether an opportunity to correct should be given.

In reviewing the question of correcting the alleged violation, the Board also will be looking for comment from the parties concerning the following potential corrective steps, all occurring while the Amendment remains in effect: (a) filing of a complete list of adjoining landowners with the District #5 Commission; (b) notice by the District Commission to such landowners of an opportunity to be heard concerning the compliance of the concert series project with the Act 250 criteria; (c) a hearing by the District Commission as to whether adjoining landowners are directly affected under the Act 250 criteria'; and (d) if any adjoining landowners requesting a hearing are directly affected, a hearing on the merits.

Based on the circumstances of this case and the filings made by the parties, the Board does not believe that such a hearing need take more than a few hours. The Board therefore will reserve some time for hearing this matter during a day on which it is considering other matters.

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[1] *See 10 V.S.A. §* 6085(c) and Rule 14(A)(3).

III. ORDER

1. The Permittee's motion to dismiss is denied.

2. This matter will go to hearing, in accordance with the above decision, solely on the issues of: (a) whether the Permittee violated Rule 10(F) by not providing the name of the Petitioner and other adjoining landowners to the District Commission when the Amendment application was filed, and (b) if so, whether the Permittee should be given an opportunity to correct that violation and what the nature of that opportunity should be.

3. **On or before May 18, 1994,** parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

4. **On or before June 2, 1994,** parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

5. The Environmental Board will convene a hearing in this matter on June 8, 1994, to be confirmed by subsequent notice with location.

6. **No** individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.

7. **The** Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

8. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8% by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8½ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

9. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: W for the Petitioner and P for the Permittee. Any other party intending to file testimony should contact the Board office to obtain a letter assignment. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Permittee will number its exhibits P1, P2, P3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. P2A, P2B, etc. However, each page of a multi-page exhibit need not be labelled.

The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, # 5L0646-3-EB, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF STOWE
LIST OF EXHIBITS
RE: MT. MANSFIELD CO., #5L0646-3-EB (REVOCATION)

Number	Description	Status
T1	Prefiled testimony of John Smith	
T2A-D	Plan dated ,____ sheets Al through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

10. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by **May 6, 1994.** One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 26th day of April, 1994.

ENVIRONMENTAL BOARD

Lawrence H. Bruce, Jr. (by AWP)

Lawrence H. Bruce, Jr., Acting Chair
John Ewing
Lixi Fortna
Arthur Gibb
William Martinez
Steve E. Wright

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